IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.01.2008

CORAM:

THE HONOURABLE MR.JUSTICE S.J.MUKHOPADHAYA
AND
THE HONOURABLE MR.JUSTICE M.VENUGOPAL

L.P.A.Nos.86 and 87 of 2001

Radhabai ... Appellant in both LPAs
Vs.
1.Arunagiri

2.Muthulakshmi ... Respondents in both LPAs

3.The Manager, UCO
Main Officer (Near Government Hospital),
Pondicherry.

4.The Director of Industrial Department,
Pondicherry. ... Respondents in LPA.86/2001

Prayer in L.P.A.86/2001: Letter Patent Appeal filed against the Judgment and Decree of this Court in A.S.No.720 of 1987 dated 21.3.2000 in reversing the Judgment and decree in respect of compensation payable to the appellant and in confirming the Judgment on other findings on the file of the Principal Subordinate Judge, Pondicherry in O.S.No.445 of 1982 dated 30.4.1986.
Prayer in L.P.A.87/2001: Letter Patent Appeal filed against the Judgment and Decree of this Court in Tr.A.S.No.438 of 1989 dated 21.3.2000 in reversing the Judgment and decree in respect of compensation payable to the appellant and in confirming the Judgment on other findings on the file of the Principal Subordinate Judge, Pondicherry in O.S.No.445 of 1982 dated 30.4.1986.

For Appellant : Mr.V.Raghavachari

For Respondents 1 & 2 : Mr.A.L.Somayaji, S.C.
For Mr.A.S.Thambuswamy

COMMON JUDGMENT

M.VENUGOPAL,J.

L.P.A.Nos.86 of 2001 and 87 of 2001 have been preferred by the appellant/plaintiff as against the Judgment and Decree passed by the learned Single Judge of this Court in A.S.No.720 of 1987 and Tr.A.S.No.438 of 1989 dated 21.03.2000 holding that the Sale Deed dated 24.04.1968 executed by Sambournathammal in favour of Visalakshiammal cannot be held as null and void and the amount awarded by the trial Court payable by the respondents/defendants 1 and 2 is not proper and setting aside the same.

2.The appellant/plaintiff filed a suit in O.S.No.445 of 1982 on the file of learned Principal Subordinate Judge, Pondicherry praying for a declaration that the Sale Deed dated 24.4.1968 executed by Sampournathammal is null and void. The learned Principal Subordinate Judge, Pondicherry after considering the oral and documentary evidence has decreed the suit as against the respondents/defendants 1 and 2 with proportionate costs and dismissed the suit against the 3rd and 4th respondents without costs. The learned Principal Subordinate Judge, Pondicherry has given a specific finding that the appellant/plaintiff is not entitled to cancel the Sale Deed as prayed for in the plaint. However, the learned Principal Subordinate Judge, Pondicherry has ordered the respondents/defendants 1 and 2 to pay a sum of Rs.7,500/- to the plaintiff in order to get absolute title over the suit properties as per Ex.A.4-ale deed dated 24.04.1968.

3.As against the judgment and decree passed by the learned Principal Subordinate Judge, Pondicherry in O.S.No.445 of 1982 dated 30.04.1986, the appellant/plaintiff in L.P.A.Nos.86 of 2001 has preferred A.S.No.720 of 1987 before this Court. The first respondent/first defendant in the suit has filed Tr.A.S.No.438 of 1989 before this Court and a common judgment was passed on 21.03.2000.

4.Aggrieved against the common Judgment and Decree passed by the learned Single Judge of this Court in A.S.No.720 of 1987 and Tr.A.S.No.438 of 1989, the plaintiff as appellant has filed the L.P.A.Nos.86 and 87 of 2001.

5.The learned counsel for the appellant/plaintiff urges that the learned Single Judge has failed to appreciate that the respondents have failed to establish by adducing evidence that the Sale Deed-Ex.A.4 dated 24.04.1968 executed by Sambournathammal in favour of Visalakshiammal is supported by consideration and that it was not tainted by fraud, misrepresentation and undue influence and that the learned Single Judge should have seen that the first respondent/first defendant engineered the entire Sale Deed dated 24.04.1968 and his non examination is fatal to the case and that adverse inference ought to have been drawn against the respondents especially when the act of fraud originated from the act of first respondent/first defendant and that the learned Single Judge ought to have seen the Sale Deed dated 24.04.1968 has been executed on 24.04.1968, well before the Mortgage Deed-Ex.B.1 dated 23.12.1971 executed by the first respondent/first defendant in favour of 4th defendant in the suit.

6.According to the learned counsel for the appellant, the learned Single Judge erred in holding that the suit is not maintainable and in this regard, the reliance placed on Section 55(b) of the Indian Union Territories Act is misconceived and further that the learned Single Judge failed to notice that Ex.B.1-Mortgage Deed dated 23.12.1971 does not bind Sambournathammal and that it is only an offshoot of Ex.A.4-Sale Deed dated 24.04.1968.

7.It is the further case of the appellant that as per Ex.A.5-Lawyer Notice dated 22.01.1980, Sambournathammal was put on notice of the fraudulent transaction only when the officials of the financial institution came to visit the property and this fact has not been taken note of by the learned Single Judge and therefore, the appellant prays for allowing L.P.A.Nos.86 and 87 of 2001.

8.It is well settled principle that when a plea of fraud is taken by the appellant/plaintiff, it is for her to establish the plea of fraud by leading evidence in support of the same. In common parlance "sale" is an exchange of a commodity or service for cash or kind. In sale, the seller or vendor barters away his property movable or immovable for valuable consideration in cash or kind paid or payable by the buyer. As a matter of fact, the plea of fraud and forgeries are to be examined in view of the attending circumstances.

9.Section 54 of the Transfer of Property Act defines contract of sale as a contract wherein sale is on terms settled between the parties.

10.It is permissible for an executrix to claim that the document is entirely different in character than the one she actually executed and she may lead parole evidence in this regard, under Section 92 of Evidence Act, 1872 as per decision AIR 2006 P & H page 1 (Harmesh Kumar V. Maya Bai). It is pertinent to point out that Section 91 of the Indian Evidence Act deals with the exclusiveness of documentary evidence; whereas Section 92 deals with the conclusiveness as also inclusiveness of such evidence.

11.It cannot be gainsaid that where the party to a written contract alleges that he/she was induced to enter into contract because of fraud, the allegations can be proved by adducing parole evidence.
12.The learned counsel for the appellant submits that the first respondent/first defendant is instrumental in concocting the Ex.A.4-Sale Deed dated 24.04.1968 and that for the business the first respondent/first defendant was managing, he availed the loan in the year 1971 from the 4th defendant and that the Mortgage Deed dated 23.12.1971 was marked before the trial Court and further that the Ex.A.4-Sale Deed dated 24.04.1968 was executed in respect of 97 kuzhis for an inadequate consideration of Rs.1,000/- and this gave rise to doubt genuineness of the nature of transaction.

13.It is significant to note that Ex.A.4-Sale Deed dated 24.04.1968 was not questioned for 18 years.

14.The learned counsel for the appellant relied on the decision (2006) 5 SCC page 353 and 354 (Prem Singh and Others V. Birbal and Others) wherein it is held as follows:
"Contract Act, 1872 – Ss.17 to 19 – Fraudulent misrepresentation – Document/transaction when void and when voidable – Held, when fraudulent misrepresentation is with respect to character of document, it is void, and when it is with respect to contents of document, it is voidable – Deeds and Documents.

Specific Relief Act, 1963 – S. 31 – Cancellation of registered document – Presumption of valid execution of registered document – Existence of – Onus of rebuttal of the presumption, held, is on person who leads evidence to rebut the presumption – Evidence Act, 1872, S.114.

Limitation – Nature of limitation provisions – Held, limitation ordinarily bars a remedy but does not extinguish a right – Though, S.27, Limitation Act, 1963 is an exception to this principle.

Limitation Act, 1963 – S.3 – Suits to which Limitation Act applicable – Held, provisions of the Act, prima facie would be attracted in all types of suits".

15.He also relied on the decision AIR 1993 SC 956 (Mst.Sethani V. Bhana) wherein it is observed as follows:
"Contract Act (1872), S.23 – Undue influence – Onus to prove – Sale deed by tribal woman, who was old, illiterate and blind, in favour of her relative with whom she was living till her death and was dependent on him – No consideration passed at time of sale – Purchaser in position to dominate and take advantage over her – Onus lies on him to prove that sale deed was not executed under undue influence".

16.In the aforesaid decision, he also relied on the observation made in para 4 wherein it is held thus:
"4.....From the certified copy thereof it was evident that no consideration passed at the time of the sale. Nobody from the registration office was examined to explain the sale. No evidence was led by the respondent to discharge the onus that the sale deed was executed under no undue influence,

even though the vendor was old, blind, illiterate and tribal woman totally at the mercy of the respondent, with whom she was living till her death. The parties were so situated that Bhana-respondent was in a position to dominate the will of Putlibai and was in a position to obtain any unfair advantage over her".

17.The learned counsel for the appellant pressed into service the decision AIR 1963 SC 1203 (Mst.Kharbuja Kuer V. Jangbahadur) wherein it is observed as follows:
"Evidence Act (1872), Ss.101-103 □ execution of document by pardanashin lady □ burden to establish that she executed it after understanding, is on him who relies on it. S.A.No.791 of 1953, D/-2-12-1957 (Pat.), Reversed."

18.The learned counsel for the appellant cited AIR 1990 SC 540 (Smt.Bismillah V. Janeshwar Prasad and Others) wherein it is held as follows:
"U.P.Zamindari Abolition and Land Reforms Act (1951), S.331 □ Bar of suit □ Party prima facie proceeding on premise that she cannot ignore sale deeds but they need to be set aside before relief of possession and other reliefs can be availed of Bar is not attracted.
1985 All LJ 325, Reversed".

19.In support of the contention that Ex.A.4, Sale Deed dated 24.04.1968 is a document obtained by the first respondent/first defendant by asking Sambournathammal to sign in the said sale deed representing that it was a surety bond and that she had also signed that it was a surety bond, the learned counsel relied on the decision AIR 1990 SC 1173 (Smt.Dularia Devi V. Janardan Singh and others) wherein it is held thus:
"U.P. Consolidation of Holdings Act (1953), S.49 □ Bar to Civil suit □ Suit to set aside sale deed □ Executant illiterate woman □ Thumb impression obtained on sale deed by making her believe that she was executing gift deed in favour of her daughter □ Misrepresentation is as to character of document □ Sale deed is totally void and not voidable □ Suit not maintainable".

20.The learned counsel for the appellant cited AIR (35) 1948 Calcutta 84 (Sm.Karunamoyee Debi V. Sm.Maya Moyi Debi and others) wherein it is held as follows:
"(a)Contract Act (1872), Ss.10, 11 and 16 □ Purdanashin lady □ Transactions by □ Principles to be applied stated.

The protection given to purdanashin ladies is given to persons who are really kept in seclusion and have little or no commerce with the outside world. It is the duty of the Court before upholding transactions with a purdanashin lady to satisfy itself that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue influence or misrepresentation. Independent legal advice is not in itself essential. The presence or absence of independent legal advice is only relevant to a decision of the question as to whether or not the grantor thoroughly comprehended and deliberately of her own free will carried out the transaction. What is necessary to establish is that the import of the document was brought home to the mind of the grantor, and that she really understood and meant to make the transfer. If the settlor's freedom and comprehension can be established or if it is proved that the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. Further, it is not necessary that she should understand each detail of a matter which might be involved in legal technicalities. It is enough if the general result of the transaction is understood by the lady. But even if intelligent understanding of the deed is established, a question of undue influence may still arise. Such influence may be direct and expressly used by a donee for the purpose or the relation between the donor and the donee may be such as to raise a presumption of undue

influence. (Considering the circumstances of the case it was held that not only was there want of intelligent execution of the deed of surrender by the Hindu widow but she was also subjected to undue influence).
(c)Contract Act (1872), S. 16 □ Pardanashin woman □ Undue influence alleged □ Questions to be considered by Court. [Paras 10 and 30]

Where undue influence is alleged, it is necessary to examine very closely all the circumstances of the case. The questions which need consideration in such a case are: (1) Was the transaction a righteous transaction, i.e., was it a thing which a right minded person might be executed to do? (2)Was it an improvident act? That is to say, does it show so much improvidence so as to suggest the idea that the lady was not mistress of herself and not in a state of mind to weigh what she was doing? (3)Was it a matter requiring a legal adviser? (4) Did the intention of making the gift originate with the donor? 15 Cal. 684 (P.C.), Rel. on. [Para 25]
21.He also cited AIR 1932 Privy Council 50 (A.V. Palanivelu Mudaliar V. Neelavathi Ammal and another) wherein it is observed as follows:
"Contract Act (1872), Ss.16 and 70 □ Ordinarily onus of proving undue influence is on party who sets up that plea □ But where person stands in position of active confidence to another onus is on him to prove good faith of transaction □ Promissory note executed by three sisters for services rendered to them □ Suit on note □ Promisee in position of active confidence to them not proving good faith □ Suit held should be dismissed as against them on basis of note □ But promisee held could claim compensation for services rendered."

22.In respect of the plea of undue influence, the learned counsel for the appellant cited AIR 1963 SC 1279 & 1280 (Ladli Parshad Jaiswal V. The Karnal Distillery Co., Ltd. Karnal and others) wherein it is held thus:
"Order 6 R. 4, Civil P. C., provides, inter alia, that in all cases in which the party pleading relies on undue influence, particulars shall be stand in the pleading. The reason of the rule is: A plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to parties of the nature of testimony required on either side in support of their respective cases. A vague or general plea can never-serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading; if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up. AIR 1937 PC 146 and AIR 1951 SC 280, Rel. on. [Para.20]"

23.He further relied on the decision AIR 1999 SC page 1441 (Vidhyadhar V. Mankikrao) wherein it is observed as follows:
"Evidence Act (1 of 1872), S. 114 □ Adverse inference □ Party of suit □ Not entering the witness box □ Give rise to inference adverse against him.
Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct. In the instant case defendant No.1 alleged that the sale deed, executed by defendant No.2 in favour of the plaintiff, was fictitious and the whole transaction was a

bogus transactions as only Rs.500/- were paid as sale consideration to defendant No.2. But this plea was not supported by defendant No.1 as he did not enter into the witness box. He did not state the facts pleaded in the written statement on oath in the trial Court and avoided the witness box so that he may not be cross examined. This, by itself, is enough to reject the claim that the transaction of sale between defendant No.2 and the plaintiff was a bogus transaction.
Transfer of Property Act (4 of 1882), S. 54 □ Sale □ When complete □ Payment of whole of price at time of execution of sale deed □ Is not sine qua non to completion of sale.
S.A.NO.352 of 1976, D/- 3-5-1991 (Bom), Reversed".

24.The learned counsel for the appellant cited the decision AIR 1981 Allahabad 222 (Ashok Kumar and another V. Gaon Sabha, Ratauli) wherein it is observed as follows:
"Contract Act (9 of 1872), Secs. 16 and 17 □ Pardanashin lady □ Suit for cancellation of sale deed □ Plaintiff, illiterate, rustic village woman □ She would be entitled to the benefit available to pardanashin lady. (Evidence Act (1872), S.111)".

25.He also placed reliance on the decision AIR (37)1950 Patna 247 at 248 (Md.Bibi Saleha and others V. Md.Zakariya Khan and others) where under it is held thus:
"Evidence Act (1872), Ss.101 to 103 □ Pardanashin woman.
Where the Court losing sight of the right of onus thrown upon persons claiming under an instrument executed by a pardanashin woman comes to a conclusion that she executed the deed knowingly, largely on circumstantial evidence which i quite consistent with the possibility that the woman did not in fact understand the nature of the deed that she was executing, the finding is vitiated. [Para15]"
26.The learned counsel for the appellant relied on the decision AIR 1982 Orissa 174 and 175 (Miti Bewa V. Daitari Nayak and others) wherein it is held thus:
"Evidence Act (1 of 1872), Ss.101-104 □ Suit by illiterate lady for declaration of title and setting aside sale deed □ Allegation that sale deed was taken from her on pretext of power of attorney □ Burden by lady is on purchaser □ Lower Appellate Court not approaching the evidence in this perspective of law □ Case remanded for disposal according to law (Contract Act (1872), S.16)".

27.He also cited AIR 1999 Orissa page 154 and 155 (Smt. Sita Bewa V. Gangadhar Bharati and others) wherein it is observed as follows:
"Where the executant of a deed is an illiterate person it is incumbent that the contents of the deed are read out and explained to such executant. The disputed document in instant case does not contain any such endorsement certificate that the contents were read out and explained to the executant. However, absence of certificate or endorsement is not conclusive or decisive and the burden can be discharged by other evidence.
Contract Act (9 of 1872), Ss.16, 18 □ illiterate lady □ Execution of sale deed □ Concurrent finding based on material evidence that she understood nature of transaction □ No interference in second appeal".

28.For the proposition of undue influence, the learned appellant counsel placed reliance on the decision AIR 2002 Punjab and Haryana 147 (Hamelo (deceased) V. Jang Sher Singh) wherein it is held as follows:
"Transfer of Property Act (4 of 1882), S.105 □ Lease □ Validity -Misrepresentation and undue influence □ Plaintiff, a lessor was illiterate old and sick lady □ Question whether lease executed by her was for one year or for 99 years □ Facts showing that there was no consideration paid for execution of lease for 99 years □ Consideration recorded in lease deed was too meagre i.e.Rs.2,500/- per annum as against lease amount of Rs.20,000/- p.a. Which plaintiff used to earn from earlier lessee □ Evidence led by defendant lessee, son of plaintiff's real brother to prove that lease was for 99 years, not free from any blemish or infirmity □ Defendant being in position to dominate will of

plaintiff extracted execution of lease for 99 years though its contents were never read over to plaintiff Further transaction was unconscionable as it was executed for 99 years for meagre amount Held, undue influence was exercised by defendant Thus transaction was hit by S. 16 of Contract Act."

29.In regard to the doctrine of non est factum, the learned counsel for the appellant cited the decision 1999 (II) CTC 275 (Thirumalai Vadivu Ammal (died) and 4 others V. Muthammal and another) wherein it is held as follows:

"Contract Act, 1872, Section 18 Misrepresentation as to nature of document executed Suit to set aside settlement deed Plaintiff is an uneducated person Plaint property leased out to third party Lessee not paying lease amount Plaintiff's niece and her spouse requesting for execution of deed of Power of Attorney so as to recovery arrears of lease amount and to manage plaint property on behalf of plaintiff Deed executed Lease amount not recovered even thereafter Plaintiff later learnt that deed executed by her was actually a settlement deed settling plaint property on plaintiff's niece and her spouse and not a Power of Attorney document as was represented to her Document not read over to plaintiff by Sub-Registrar Stamp papers bearing different dates issued by different vendors in different places Evidence on record established that settlement deed was result of fraud played by plaintiff's niece and her husband Suit filed by plaintiff against her niece and her spouse for setting aside settlement deed Originally suit was dismissed and appeal preferred to High Court was also dismissed On Letters Patent Appeal Division Bench remanded case to Appellate Court for fresh consideration On appropriate appreciation of evidence it was held that plaintiff was ignorant of contents of document and hence execution of such document was not intended and she never intended to sign any settlement deed Settlement deed in favour of plaintiff's niece and her spouse was declared void - Doctrine of non est factum relied upon to set aside settlement deed". [paras 35,37& 39]

Doctrine of non est factum Plaintiff executed document which she never intended to sign Representation that she is executing a power of attorney deed whereas actually it was a deed of settlement Plaintiff was illiterate person Mind did not accompany plaintiff's thumb impression and signature, settlement deed was declared void Doctrine of non est factum comes to play".

30.We have heard the parties and noticed the respective contentions.

31.P.W.1, Radabai (plaintiff) in her evidence has deposed that Sambournathammal is her mother-in-law and first defendant is the son of her father-in-law through a kept mistress and the second defendant is the sister of first defendant and that the first defendant started an industry at Thattanchavady by name, Sea bird Industry and availed loan from the Bank and also from the director of industries amounting to Rs.25,000/- and Rs.17,000/- and the first defendant in this connection, obtained several documents from her mother-in-law by obtaining her thumb impression on several documents, which were not filled up and in a blank form. It is the further evidence of P.W.1- Radabai that there was a case by her in Court and during that period first defendant represented her mother-in-law saying that it is for a surety in connection with the Court matter and since her mother-in-law cannot come to Court due to old age, first defendant represented to give him a letter from her mother-in-law, which she executed and her mother-in-law does not know to read and right and when Rs.1000/- was offered to her mother-in-law, she was surprised to know what was the purpose and the notaire and the first defendant told her mother-in-law that she executed a sale deed in favour of first defendant's mother and the amount is only for consideration and after that her mother-in-law received the amount and handed over to first defendant and thereafter, first defendant sent away her mother-in-law from the house and later she brought her mother-in-law and she lived with her for some years.

32.The evidence of P.W.1, Radabai is that the sale deed dated 24.04.1968 in favour of first defendant's mother is not valid and binding, since it was brought fraudulently by misrepresenting to her mother-in-law and that property worth Rs.40,000/- was conveyed for a paltry sum of Rs.1000/- under the impugned sale deed and therefore, she says that the sale was executed for no consideration and that it is a fraudulent one intended to defeat her rights and previously her mother-in-law issued a notice to first defendant's mother disputing the alleged sale deed-Ex.A.5.

33.P.W.2, Kuppusamy in his evidence has deposed that he knew Sambournathammal, since he was a neighbour and that her husband was Sambasivam and Sambournathammal is his brother's wife and Radabai (PW1) was also present at the time when Sambournathammal told him about the document and Sambournathammal was under the protection of Radabai and he did not ask the relatives to interfere and help Sambournathammal about the fraud committed by the first defendant. P.W.2, Kuppusamy has further deposed that he does not know about the sale of property by Sumburnam in favour of Visalatchi and he came to know in 1980 and it was 4 or 5 months prior to the death of Sumburnam and he does not know whether the sale was registered.

34.D.W.1-Chembakavalli, the wife of first defendant, in her evidence has deposed that the property originally belonged to Sambournathammal and it was sold for Rs.1000/- on 24.04.1968 and it was only worth that much and that Sambournathammal died 3 years ago and during her life time, she did not challenge or dispute the sale and the plaintiff is her daughter-in-law and it is false to say that the sale deed was obtained fraudulently and on misrepresentation. Further, D.W.1-Chembakavalli in her cross examination has deposed that her husband used to tell her about his money dealings of the business and that in 1967 he borrowed and she did not go at the time of execution of mortgage and it was for Rs.19,000/- in favour of 4th defendant.

35.D.W.2-Muthulakshmi in her evidence has deposed that she is the second defendant and her father is Sambasivam, who had two wives and her mother is Visalakshi, second wife of her father and first defendant is her elder brother and she knew the loan borrowed by first defendant.

36.D.W.3-Krishnamurthi in his evidence has stated that the first defendant, Sambournathammal and Visalatchi executed a Mortgage Deed, Ex.B.1 dated 23.12.1971 for Rs.19,500/- in favour of their department and that steps were taken to recover the loan under the Revenue Recovery Act and that a sum of Rs.2,000/- was paid and the same property was given to UCO Bank on mortgage before their mortgage and that the loan was given to start an Industry by name, Bird Industry at Mannapet, Pondicherry and as per copy of the Judgment in O.S.No.77 of 1978, they can recover the balance amount after discharge of loan to UCO Bank and as per the loan register maintained, 3 names are mentioned as partners for the Sea Bird Industry and that the recovery is against 3 persons. He further deposed that the loan was borrowed by the Sea Bird Industries by partnership firm and 1.Visalatchi, 2.S.A.Giri and 3.Sambournathammal are the partners and he does not know whether Sambournathammal had eye defect at the time of execution of Ex.B.1, Mortage Deed dated 23.12.1971.

37.In AIR 2004 Andra Pradesh 326(Kavitha Koud V. Nookala Showdry Reddy) it is held that 'Merely because of a property worth several thousands of rupees was sold away for a few hundred rupees by the owner, for his own reasons, a 3rd party cannot question or challenge the sale transaction on the ground that sale consideration is not adequate or on the ground of under valuation of the property.'

38.In Lachhman Dass V. Jagat Ram and Others in Judgments Today 2007 (3) at 595 and 596 the Hon'ble Supreme Court has observed as follows:
"The fact that Appellant has purchased the suit premises was known to her. Appellant was in possession of the land. The execution of a registered deed of sale shall also be treated as a notice in

terms of Section 3 of the Transfer of Property Act, 1882, which is in the following terms:
"...."a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.
Explanation I.- Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section(2) of section 30 of the Indian Registration Act, 1908 (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated: Provided that
(1)the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (16 of 1908), and the rules made thereunder,
(2)the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act, and
(3)the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.
Explanation II. Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereon." (Para 13)."

39.In AIR 1980 Patna page 220 (Tribeni Pd.Rastogi V. Basudeo Pd. Rastogi), it is held that "Section 54 of T.P. Act entitles the owner of a tangible property to transfer his ownership in the same in exchange for a price paid or promised or part-paid or part-promised. Consideration in such a case is, therefore, the price. The word "object" in Section 23 of the Contract Act has not been used in the same sense as "consideration" but means purpose or desire. Thus a consideration for an agreement may be the receipt of a certain sum of money which is perfectly legal, but this object may be to defeat the provisions of any law which may be unlawful. Therefore a transaction of sale out and out for a valid consideration cannot be said to be hit by the mischief of Section 23 of the Contract Act. AIR 1952 Mad 579, AIR 1972 All 357 and 1959 BLJR 549, Dist."

40.It is useful to refer to the decision AIR 1961 SC 1747 (Ram Saran V, Domini Kuer) whereunder it is observed as follows:
"Muhammadan Law Pre-emption Talab-i-mowasibat Must be made after completion of sale Sale is complete when document to be registered is copied out in records of registration office as required by S.61 of Registration Act AIR 1926 All 549:95 Ind Cas 138, Overruled."

41.It is not out of place to refer to the decision AIR 1953 Patna 330 (Girish Narain V. Akhtar Hussain) wherein it is observed as follows:
"A sold certain property to B for a consideration of Rs.3000/- out of which Rs.1646/- were to be paid to creditors in satisfaction of debts which A was liable to pay. The balance was to be paid at the time when the registration receipt was handed over to the vendee. It was further agreed that the husband of the vendor should execute a jamanatnama in favour of the vendee so as to compensate her in case there was any defect found in the vendor's title to the properties. Neither the registration receipt nor the sale deed was handed over to the vendee, and she did not get possession of the properties covered by the deed. In a suit by B for declaration of title and for possession:
Held that it was manifest from the recitals in the deed and from the facts that the intention of the

parties was that title should pass on the payment of the consideration money, which was to be paid at the time of the passing of the registration receipt.
(2)As no consideration had been paid either to the vendor A or to her creditors no title had passed to B under the deed. AIR 1949 Pat 364; AIR 1947 Pat 1 and AIR 1950 Pat 288, Rel. on. (Para 8) Anno: T.P. Act S. 54, N.5, 14, 17."

42.In AIR 1952 Bombay 425 (Narsingdas Takhatmal V. Radhakisan Rambakas and others) it is held that "Merely because a party knew the circumstances under which the previous transaction had been entered into and was thereby affected with the knowledge of the circumstances attendant upon the transaction when he in his turn entered into his own transaction, it does not follow that he would be guilty of fraud if he set up a title contrary to the facts and circumstances thus known to him. The fraud which is contemplated in proviso (1) to S.92, Evidence Act is at the very inception a fraud which vitiates the transaction itself and not any subsequent conduct or representation on the part of the party or his representative in interest which, however reprehensible it may be, is not enough to vitiate the transaction. The evidence of such conduct or representation, therefore, cannot be led within the meaning of proviso (1) to S.92, Evidence Act: 8 Ind. Cas.644 (Bom.), Foll.)"

43.In AIR 1970 Orissa 218 (Nrusinghanath Deb and others V. Banamali Panda and others), it is held that "Where the sale deed showed unequivocal intention of making immediate conveyance of title and consideration was to be received subsequently at the time of endorsing registration ticket title passed on registration of sale deed even when consideration did not pass. AIR 1953 Orissa 23, Followed."

44.In AIR 1995 All. 357 at page 358 (Godhan son of Pola and others V. Ram Bilas son of Mahesh) it is held as follows:
"Civil P.C. (5 of 1908), Section 100 □ Second Appeal □ New plea □ Permissibility □ Vendor raising plea as to sale consideration being too low not entitling vendee to claim decree for specific performance □ Plea as to exercise of discretion not raised before Courts below □ It is not open to vendor to raise it in second appeal.(Para 25)."

45.At this juncture, it is to be noted that contract of sale is based on mutuality. It is not in dispute that Sambournathammal is the first wife of Sambasivam and Visalatchi is the second wife of said Sambasivam. D.W.1, Chembakavalli's husband Arunagiri is the first defendant in the suit, who was not admittedly examined as witness in the case. D.W.2 Muthulakshmi's (second defendant) elder brother is the first defendant Arunagiri.

46.Ex.A.5 dated 22.01.1980 is the lawyer notice issued for on behalf of Sambournathammal addressed to Visalatchiammal, the second wife of Sambasiva Chettiar. In the said Ex.A.5, notice dated 22.01.1980 it is mentioned as follows:
"While so, my client says that, your son Mr.Arunagiri started one Bird construction Industry. In order to avail Bank loan, yourself and your son requested my client to give surety by Mortgaging the property. Since you are the second wife of my client's husband and Arunagiri is your son, my client is obliged to your request. My client states that she was taken to Mr.Balagopalan, Notaire, on 24.04.1968 to obtain the signature for giving surety. My client further says that she is an illiterate and old about 95 years now. She put her thumb impression hoping that the deed is only a surety deed on 24.04.2008. Afterwards your son Arunagiri obtained a Bank loan and started his business. When the Bank authorities inspected the property in the month of September 1979 my client enquired them about the purpose of their visit. The Bank authorities told her that it is to be sold for non-payment of the loan amount. Immediately my client asked Arunagiri about it to which, to the surprise of my client, your son stated that, his mother, that is yourself has purchased the property on

24.04.1968 for a sum of Rs.1000/- and therefore, she has got no right to ask about it. Then my client started enquiring about the deed of 24.04.1968 and got a registered copy of them. After seeing the deed, my client found that it is only a sale deed and not a surety deed. My client says that, taking advantage of her illiteracy and old age and defective eye-sight you obtained a bogus sale deed fraudulently with ulterior motives without disclosing the real fact to her. My client further states that she did not receive any amount either from you or from your son as stated in the deed dated 24.4.1968 and on the other hand you and your son made her to believe that it is only a surety deed. Since you have obtained the sale deed by fraud without consideration, legally it is invalid and not binding on her or the property. The property was worth about more than Rs.30,000/- at that time itself. The consideration stated in the deed is insufficient. On this ground also it proves the matters behind the tune, that is your fraudulent and deceiving behaviour."

47.Even though, Ex.A.5 Notice dated 22.01.1980 issued on behalf of Sambournathammal states that the property was worth about more than Rs.30,000/- at the time of the execution of Ex.A.4 sale deed dated 24.04.1968, P.W.1 Radabai (plaintiff) in her evidence in cross examination has clearly stated that she has not mentioned what was the market value of the property in the year 1968 and also that she has not filed any document to show the market value for that year. There is no dispute that the first defendant and the second defendant are the son and daughter of Sambasiva Chettiar and Visalatchiammal. According to the evidence of P.W.1 Radabai (plaintiff), first defendant is the son of her father in law through a kept mistress and second defendant is the sister of first defendant.

48.It cannot be lost sight of that Sambournathammal did not challenge the Ex.A.4 sale deed dated 24.04.1968 at the earliest possible time during her life time. In Ex.B.1 Mortgage deed dated 23.12.1971 executed by: (i)first defendant as Proprietor of Sea Bird Industries, Mannapet, (ii) Sambournatammalle and (iii) Vissalatchy Ammalle in favour of 4th defendant, Sambournathammal and Visalatchiammal have affixed her thumb impression and the first respondent/first defendant has signed. Admittedly, the items 1 and 2 of the Mortgage Deed-Ex.B.1 dated 23.12.1971 are not the subject matter of the present suit. From Ex.B.1-Mortgage Deed dated 23.12.1971 executed by the first respondent/first defendant and two others, it is evident that for the working capital loan purpose of the M/s.Sea Bird Industries of the first respondent/first defendant for a sum of Rs.19,500/- and in consideration of the said amount, the properties mentioned in the said document were mortgaged.

49.Ex.B.2 is the certified copy of the judgment dated 19.12.1981 passed by the learned first Additional Sub Judge, Pondicherry in O.S.No.77 of 1988 filed by the UCO Bank, Pondicherry Main Branch (3rd defendant in O.S.No.445 of 1982 on the file of Principal Sub Judge, Pondicherry) against the Industries run by the first respondent/first defendant, second respondent/second defendant and two others for a recovery of amount of Rs.39,160.42 with interest at 12% per annum from the date of plaint till the date of realisation and for costs from the defendants and the suit was decreed against the respondents 1 and 2/defendants 1 and 2. As a matter of fact, the respondents/defendants 1 and 2 were held jointly and severally liable to pay the suit claim with interest at 12% per annum from the date of plaint till the date of realisation and a preliminary decree was passed for sale of plaint 'A' and 'B' schedule properties for realisation of the suit claim. It is pertinent to point out that only after Ex.A.4-Sale Deed dated 24.04.1968, the mortgage was created in the year 1971.
50.It is the specific evidence of D.W.2 Muthulakshmi that she has not signed in the Notaire Office for the sale deed and that her step mother signed in the document executed before Notary and that Sambournam at the time of her death had feeble eye sight and she know to read and it is not true that her step mother does not know to read and write.

51.Even though P.W.1 Radabai in her evidence has stated that her mother-in-law Sambournathammal does not know to read and write and the notaire and the first defendant told her

mother-in-law that she executed a sale deed in favour of the first defendant's mother and the amount is only for sale consideration and that her mother-in-law received the amount and handed over to first defendant, a perusal of Ex.A.4-sale deed dated 24.04.1968 indicates that the said sale deed was executed by Sambournathammal in favour of Visalatchi before the notaire N.K.Balagopalin for a sum of Rs.1000/- in the presence of witnesses (i)Subramanian (ii)Ramalingampillai and therefore we opine that the evidence of P.W.1 Radabai does not inspire confidence in this regard.

52.In regard to the evidence of D.W.2 Muthulakshmi that 'they received notice on earlier occasion from her step mother and when she enquired her to which her step mother informed that she has not issued any notice and that it was done at the instance of plaintiff', the same is not a favourable circumstance in favour of the appellant/ plaintiff in our considered opinion.

53.Though P.W.1 Radabai in her evidence has deposed that 'in regard to the availing of Bank loan by first defendant and also from the 4th defendant viz., Director of Industries amounting to Rs.25,000/- and Rs.17,000/- in that connection the first defendant obtained several documents which were not filled up and in a blank form', the same has not been proved to the subjective satisfaction of this Court.

54.As far as Ex.A.3 notice dated 03.01.1981 issued by the appellant/plaintiff/P.W.1 addressed to defendants 1 and 2 is concerned, the averment inter-alia found therein that 'subsequently, in September 1979 the Bank authorities had come to the under mentioned property for inspection and they have informed my client's mother-in-law that they are going to sale the same for the loan amount due from Arunagiri, number one of you', in our opinion cannot be true because there is a decree passed in O.S.No.77 of 78 on the file of first Additional Sub Judge, Pondicherry on 19.12.1981.

55.It is significant to point out that Ex.B.1 Mortgage Deed dated 23.12.1971 in favour of 4th defendant was executed by Sambournathammal and Visalatchiammal and in this deed out of 4 items, item 3 and 4 properties are subject matter of the present suit and also the properties sold by Sambournathammal as per Ex.A.4-Sale Deed dated 24.04.1968 to Visalatchi. Therefore, in our considered opinion, a genuine and reasonable conclusion can be drawn that when Sambournam joined in the execution of Ex.B.1 Mortgage Deed dated 23.12.1971 along with Visalatchi, Sambournam had full knowledge that Visalatchi joined in the execution of Mortgage Deed only as absolute owner of item 3 and 4 properties and the said Sambournam was required to join in the said deed only in the capacity of owner of item 1 and 2 properties.

56.Though the appellant/plaintiff lay a claim for the properties as per Will of Sambournathammal dated 22.09.1980 the recital that 'in regard to the schedule mentioned properties of the Will, there is a case between herself, Arunagiri and his mother Visalatchi and after her demise, the said Radabai has to conduct the case', cannot have any effect in regard to the issue whether the Sale Deed dated 24.04.1968 is null and void etc., since the appellant/plaintiff has to prove her claim in the suit. As a matter of fact, when Ex.A.5-lawyer notice dated 22.01.1980 issued on behalf of Sambournam addressed to Visalatchi, the said Visalatchi was not alive. Merely because in Ex.A.4-Sale Deed dated 24.04.1968, the sale consideration is mentioned as Rs.1000/-, it cannot be said that the said Sale Deed suffers from fraud or undue influence etc. To put it differently, the Sale Deed-Ex.A.4 dated 24.04.1968 though questioned by the appellant/plaintiff as that the sale consideration is not adequate for large extent of property conveyed under the said document since the said contract of sale between the parties has been on the terms settled between them, the same is perfectly legal and valid in law and the same is not covered by the term of 'mischief' as per Section 23 of the Contract Act, in the considered opinion of this Court.

57.Suffice it to point out that the best person who can speak about the nature of Ex.A.4-Sale Deed dated 24.04.1968 is none else than Sambournathammal, who is not alive.

58.From the English translation of the Sale Deed dated 24.04.1968, it is evident that the contents of the said document were read over to the parties and the parties having declared not knowing to sign and that the witnesses (i)S.Ramalingampillai and (ii)D.Subramanian have signed along with the Notaire N.K.Balagopalin. The witness S.Ramalingampillai has signed in Tamil and the other witness D.Subramanian has signed in French and the Notaire N.K.Balagopalin has also signed in French. It is apt to point out that in the decision AIR 1973 Calcutta 295 at 299 (Susama Bala Sur V. Bibhuti Bhusan Mondal), it is observed that "the relevant French Law about the Notarial bonds and its enforcement is contained in the Decret (in effectiveness similar to an Act or Regulation in India) promulgated by appropriate authority on November 23, 1887 and the relevant articles are:
"Art. 2.Notaries are public officers set up to entertain all deeds and contracts to which the parties should or intend to clothe with the character of authenticity attached to the acts of public authority, and to attest their date, to preserve them in deposit to deliver "grosses" copies and copies of them.
Article 20. All notarial deeds make full evidence in Courts of Justice of the agreement that they contain between the contracting parties and their heirs or assigns.
They are executory in the whole extent of the territory of the Republic and in all French possessions."
Art.26.Only "grosses" copies are delivered in executory form: they are titled and terminated in the same terms as the judgments of courts of justice." Moreover, in the Pondicherry Code Volume-I (published by the Law Department, Government of Pondicherry) The Schedule (See Section 1(3) para 1) page 350 refers the year 1952, No.53 as the Notaries Act, 1952 and in that view, we are of the opinion that Ex.A.4-Sale Deed dated 24.04.1968 has the character of authenticity. It is pertinent to point out that as far as the present case is concerned, no document has been filed to know on what date the said Visalatchi expired.
59.In the backdrop of foregoing detailed discussions and on consideration of available material evidence on record and taking into account of all the attendant and surrounding circumstances together, we come to the conclusion that the appellant/plaintiff is not entitled to the relief of declaration that the Sale Deed dated 24.04.1968 executed by Sambournathammal is null and void and further that the amount of Rs.7,500/- ordered by the trial Court, to be paid by defendants 1 and 2 to the appellant/plaintiff is not correct in law and set aside by the learned Single Judge is perfectly valid in law and in this view of the matter, L.P.A.Nos.86 and 87 of 2001 filed by the appellant/plaintiff fail and the same are hereby dismissed. However, considering the facts and circumstances of the case, there shall be no order as to costs.

(S.J.M.,J.) (M.V.,J.)

24.01.2008
Index : Yes

Index : Yes

sgl

To

The Principal Subordinate Judge,
Pondicherry.
S.J.MUKHOPADHAYA,J.
AND

M.VENUGOPAL,J.

sgl

Judgment in
L.P.A.Nos.86 and 87 of 2001

24.01.2008